THE COURT OF APPEAL

[2015 No. 79]

[2015 No. 80]

The President

Peart J.

Hogan J.

BETWEEN

SJL AND LRC

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

APPELLANTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of the President delivered on 26th February 2016

1. The personal litigants named above as applicants for asylum are husband and wife who are Chinese nationals who come from Fujian province. Their account as detailed in the information they supplied in the application process is that the wife was born in 1975 and the husband in 1977. She gave birth to a son in August 1998, in secret, because the father was not then at the minimum age to marry which was 22 years. They married in January 1999, when he had reached the minimum age. On registering the marriage, it was discovered that the wife was again pregnant and the Family Planning Commissioner informed them that the child must be aborted. They went into hiding and their second son was born on 1st August 1999, following which the wife returned home. On 24th August 1999, the wife was forcibly taken to hospital and was permanently sterilised by cutting her fallopian tubes. The couple were also charged in relation to the births and fined 8,500 Yuan in respect of the unplanned birth before the legal permitted age and 16,600 Yuan in respect of the second birth which was contrary to legal permission. Some 11,000 Yuan was paid. The Family Planning authorities returned, seeking to take the husband for sterilisation, whereupon the couple fled to Fuzhou city. They could not register with the authorities there without the required documentation and were unable even to return to the husband's area to procure the documents. They left their children in the care of the husband's parents.

2. The wife and husband fled China on 15th February 2000 through the agency of a smuggling gang. They travelled through different destinations over the course of two months, sometimes by plane and sometimes by car. They became separated in the course of the journey. The wife arrived in Ireland on 23rd April 2000, while the husband arrived on 28th April 2000. They lived among the Chinese community and worked in various Chinese restaurants. In 2003, their family put them in touch with an agent, a Chinese national, whom they met in Dublin with a view to procuring legal status for the wife in the United Kingdom, hoping that she would in due course be joined by her husband and children. She accompanied the agent to the United Kingdom on 28th March 2003, but she was detained at the airport. She recalled being fingerprinted and completing a form with the assistance of an interpreter. The agent then immediately brought the wife back to Ireland by boat since his plan was unsuccessful. If he had succeeded in procuring legal status, he would receive €10,000. The couple continued working in various Chinese restaurants until detected by the Gardaí in November 2005. They then applied for asylum. They submitted completed questionnaires in December 2005 in which they claimed that if they were returned to China, the authorities would make an example of them because of their early marriage and early birth of children, they would be exposed to wide publicity and regarded as outcasts, the husband would be forcibly sterilised and their children would be adversely affected. The wife responded to a query about her medical condition, saying that conjugal relations caused her pain because of scarring from the sterilisation operation.

3. The applicants were duly interviewed in accordance with asylum process and there followed s. 13 decisions. In their submissions, the couple complain that the s. 13 decisions contained adverse findings about credibility, despite the fact that the officers who reported had not been the persons who conducted the interviews. The s. 13 decision in each case was that the applicants should not be considered to be refugees. Their applications lacked credibility and the country of origin information did not support the claims. There were inconsistencies and discrepancies. There was a finding in each case pursuant to s. 13(6)(c) of the Refugee Act 1996, that the husband and wife had not applied for asylum on arrival in Ireland, and in the wife's case, there was an additional point that she had actually applied for asylum in the United Kingdom. The consequence of these findings was that any appeal in respect of the s. 13 decisions was on the papers only and did not involve an oral hearing.

4. Section 13 (6) sets out the findings the Commissioner can make in respect of declaring the applicant not to be a refugee and s. 13(6)(c) and (d) of the Act are as follows:-

"(c) That the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;

(d) the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected)"

5. The husband and wife each appealed against these decisions. The couple's solicitors submitted legal argument and furnished country of origin reports. They offered explanations for inconsistencies in the evidence and discrepancies and country of origin information then and later, made legal submissions and offered argument and explanations in respect of adverse credibility findings contained in the s. 13 reports.

6. The Tribunal's decision in both cases is dated 27th January 2009. The Tribunal repeated and upheld the credibility findings of the Commissioner. The Tribunal did not accept that the husband's stated fear that he would be forcibly sterilised, if returned, was well-founded by reference to country of origin information relating particularly to his home province and also generally in regard to the position in China. The Tribunal held that the husband and wife could not be considered members of a particular social group within the meaning of s. 2 of the Refugee Act 1996 as amended, and they had therefore failed to establish a Convention reason on which they could rely on claiming asylum. In reaching this conclusion, the Tribunal referred to a number of legal authorities and concluded as follows:

"Coherent formulation of this particular group is difficult and there is nothing to link couples who oppose the Government's policy so as to create a perception that they constitute a particular social group. If such a group existed it would appear that it would be defined solely by the fact that its members face a particular form of persecutory treatment and it is well accepted that it should be possible to identify the group independently of the persecution. I conclude that there is no particular social group to which the claimant belongs and the Applicant does not come within section 2 of the Refugee Act 1996 (as amended) and as the Applicant does not belong to any social group, it follows that there is no link between the harm feared and the political status of the Applicant."

The High Court Judgments

7. In the case of LRC on 1st October 2014 and SJL on 10th October 2014, Barr J. delivered judgments ion the two cases in similar terms. Thereafter, he made consequential orders on 22nd January 2015 quashing the decisions of the Refugee Appeals Tribunal in the two cases. He also gave leave on the latter date pursuant to s. 5(3) of the Illegal Immigrants (Trafficking) Act 2000, certifying that the judgments in the two cases involved points of law of exceptional public importance and that it was desirable in the public interest that appeals be taken. The judge gave that leave on three grounds, but the appeals brought herein by the State defendants are against the entirety of the decisions.

8. The essential conclusions reached by the trial judge in each case are as follows:

"Applying the various dicta in the case law already cited herein, it seems to me that it is arguable that the applicant could be seen as being part of a particular social group. The applicant and her husband can be seen as part of a social group defined as people who, contrary to the one child policy in China, have had more than one child without permission. The shared characteristic is that they are parents of more than one child born in China without official permission. This characteristic cannot be changed by the applicants. In that capacity, it is arguable that they face persecution in the form of forced sterilisation (already carried out on the wife and threatened against the husband); large fines; loss of employment; and discriminatory treatment such as discrimination in relation to medical and educational benefits."

9. The judge went on in each case to refer to the country of origin information that was submitted on behalf of each applicant. The judge held that the Tribunal only had regard, or appeared to have regard to one piece of country of origin information that dealt with Fujian province which was a UK Home Office Report of April 2002 that was attached to the s. 13 report. The judge held that the remainder of the country of origin documentation was ignored by the Tribunal and that cases should be referred back for further consideration of the claims in light of all the documentation. The Tribunal was entitled to reject the documentation if it so decided, but it should state its reasons in that event and this it had not done.

10. In respect of the credibility findings, the trial judge held that there was evidence on which the Tribunal was entitled to come to adverse conclusions, but that he was satisfied that "the applicants' lack of credibility related not to their core story, but to peripheral aspects of their account". The High Court directed that the matter in each case be referred back to the Tribunal for a fresh determination in light of the country of origin information submitted on behalf of the applicants and in light of the other findings of the court.

11. The judge granted a certificate entitling the State defendants to appeal on the basis of the following points:

"1.Whether people who, contrary to the one child policy in China, have had more than one child without permission, are members of a 'particular social group' for the purposes of s. 2 of the Refugee Act 1996 and/or Article 10 of the European Communities (Eligibility for Protection) Regulations 2006 and/or Article 10 of the Qualification Directive;

2. Whether the fact that a person is a parent of more than one child born in China without official permission is a 'shared characteristic' for the purposes of Article 10.1(d) of the Qualification Directive or Article 10(1)(d)(i) of the European Communities (Eligibility for Protection) Regulations 2006;

3. Whether the breach of a law of general application, and in particular the law providing for the 'one child policy' in China constitutes a 'common background that cannot be changed' or a 'characteristic that is so fundamental to identity or conscience that a person should not be forced to renounce it' within the meaning of Article 10 of the Qualification Directive and/or Regulation 10 of the European Communities (Eligibility for Protection) Regulations 2006."

The Appeal

12. The State appellants' grounds of appeal may be sub-divided as follows. First, the trial judge applied the test of arguability in determining the judicial review application which was substantive and was thereby in error. Secondly, the applicants did not form part of a particular social group within the meaning of s. 2 of the Refugee Act 1996, or Article 10(1)(d) of the Qualification Directive or Regulation 10 of the Irish Regulations. The judge erred in defining the group and the elements by reference to the persecution that the applicants claimed they feared in circumstances where the sanctions in question were imposed on foot of a law of general application that was non-discriminatory. Thirdly, the judge was in error in holding that the credibility findings made by the Tribunal were peripheral to the claims, in that one of the core issues related to the fines that the applicants claimed were imposed and which they alleged constituted discriminatory treatment and in respect of which they gave inconsistent evidence. Fourthly, the applicants did not establish a well-founded fear of persecution because the country of origin information relevant to their home province of Fujian did not support a risk, as they alleged, of forced sterilisation. Fifthly, the judge was in error in holding that the Tribunal only considered one piece of country of origin information when the Tribunal actually quoted from one of the document submitted by the solicitor for the applicants and when the Tribunal said that it had considered all the documentation submitted to it. In this respect, the court was also in error in misapplying the duty to give reasons.

The Law Applicable

Refugee Act 1996, Section 2

13. In this Act "a refugee" means a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Council Directive 2004/83/EC Article 10.1 (d)(the Qualification Directive)

14. "(d) a group shall be considered to form a particular social group where in particular:

> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."

Regulation 10 of the European Communities (Eligibility for Protection) Regulations 2006 implements the provisions of the Qualification Directive

15. "(d) a group shall be considered to form a particular social group where in particular—

> (i) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or
>
> (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society." [Emphasis added]

Case law

16. In *Re ZWD Refugee Status Appeals Authority* (20th October 1992) (New Zealand), it was held that there was nothing to link couples who opposed the government's policy so as to create a perception that they constituted a particular social group. The Tribunal found that if a group existed, it would be defined solely by the fact that its members faced a particular form of persecutory treatment and it was well-established that it should be possible to identify the group independently of the persecution. The Tribunal concluded that there was no particular social group to which the respondents belonged, and the Convention nexus was lacking. Mr. Roger Haines Q.C. sitting as an appellate Tribunal looked at all the groups that persons in the claimed situation to which the applicants might belong. Mr. Haines had proceeded on the alternative basis that the group could be defined and the question was whether there was an internationally recognised fundamental human right to resist population control measures of this kind. He found that there was not. Mr. Haines stated that at p. 80:-

> "Unless the group is capable of reasonably precise definition, it becomes difficult, if not impossible, to address the balance of the issues. The problem faced by the appellant is that identification of the group on the present facts is virtually
>
> impossible. For the group may conceivably be defined in any or all of the following terms:
>
> > a) Persons, whether married or unmarried, whether parents or non-parents, who believe the one-child policy to be wrong, whether for political, religious or other reasons.
> >
> > b) Persons affected by the policy, irrespective of their agreement or disagreement with the policy.
> >
> > c) Married couples who do not yet have children, but who believe that they should nevertheless have an unrestricted right to procreate and to control their own fertility
>
> without interference by the state.
>
> > d) Parents per se.

e) Parents who already have one child and who would like to have a second child.

f) Parents who already have one or more children and who believe that there should be no limit to the number of children they can procreate.

g) Anyone who has been required to submit to any form of birth control measure whether by way of abortion, sterilization or otherwise.

No doubt different or further formulations are possible. Each formulation may, of course, produce possibly different answers in relation to the two further issues to be addressed. It is our view that a coherent formulation of the group is impossible. The appellant's case must fail for this reason alone. But we will nevertheless proceed on the alternative basis that it is possible to define the group."

17. In Shah v. Home Secretary [1992] 2 AC 629, a decision of the House of Lords, the applicants, who were both citizens of Pakistan but were otherwise unconnected with each other, suffered violence in their country of origin after their husbands had falsely accused them of adultery. Both applicants arrived in the United Kingdom and were granted leave to enter as visitors for six months. Both subsequently applied for asylum on the ground that having been abandoned by their husbands, lacking any other male protection and condemned by the local community for sexual misconduct, they feared that if they were returned to Pakistan they would suffer persecution in the form of physical and emotional abuse, would be ostracised and unprotected by the authorities and might be liable to death by stoning in accordance with Pakistani Sharia law. The Secretary of State for the Home Department refused the applications on the ground that the applicants were not members of a "particular social group" within the meaning of article 1A(2) of the Convention and Protocol relating to the Status of Refugees so as to entitle them to refugee status under the Convention.

18. The House of Lords held (Lord Millett dissenting), that a "particular social group" within the meaning of article 1A(2) of the Convention had to exist independently of the persecution so that persecution alone could not be relied on to prove the group's existence, but that cohesiveness was not an essential requirement; that (per Lord Steyn, Lord Hoffmann and Lord Hope of Craighead) because in Pakistan women were discriminated against as a group in matters of fundamental human rights, and the State gave them no protection because they were perceived as not being entitled to the same human rights as men, women in Pakistan constituted a "particular social group" for the purposes of article 1A(2); that (per Lord Steyn and Lord Hutton) the applicants also belonged to a "particular social group" which was more narrowly defined by the unifying characteristics of gender, of being suspected of adultery and of lacking protection from the state and public authorities; that although not all members of the group were persecuted, the applicants' well founded fear of persecution which was sanctioned or tolerated by the state was for reasons of membership of a particular social group; and that, accordingly, they were entitled to asylum under the Convention.

Lord Hope at p. 643 stated:-

> "The only clear rule which can be said to have been generally recognised is that the persecution must exist independently of, and not be used to define, the social group."

Lord Hoffman stated at p. 651:-

> "The notion that the Convention is concerned with discrimination on grounds inconsistent with principles of human rights is reflected in the influential decision of the U.S. Board of Immigration Appeals in In re Acosta, 19 I. & N. 211 where it was said that a social group for the purposes of the Convention was one distinguished by:
>
> > 'an immutable characteristic . . . [a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed'.
>
> This was true of the other four grounds enumerated in the Convention. It is because they are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights."

19. In *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314, the Canadian Court of Appeal found that a woman at risk of sterilisation for breach of the policy was a member of a "particular social group. Linden J.A. noted that there was "very little jurisprudence directly addressing the meaning of the phrase 'membership of a particular social group'."

20. In another *Canadian case, Chan v. (Minister of Employment and Immigration)* 128 DLR (4th) 213 [1993] 3 F.C. 657, decided shortly after Cheung, there was much more extensive analysis of the concept of particular social group and its application to those who alleged they breached the one child policy. In Chan, the majority found that a father who claimed to fear forced sterilisation was not a member of a particular social group. The rationale of the two majority judgments was that parents in China with more than one child who disagreed with forced sterilisation were not within any of the three categories of group which the Canadian Supreme Court had previously decided in Attorney General v. Ward [1993] 2 S.C.R. 689 and therefore did not fall within the definition of particular social group.

21. In *Chan* Desjardins J. stated at p. 721:-

> "The 'innate or unchangeable characteristic' had to be distinguished from the basic human right which the group might defend. The innate characteristic had to be so strong that it would make a group of individuals what they are, independently of that for which they fight. While she accepted that forced sterilization violated the basic human right of reproductive control, Desjardins J.A. found that while the basic rights of the group were threatened, the appellant's group was not affiliated in so fundamental a manner as to qualify as a particular social group. A violation of a basic human right did not, by itself, create a 'particular social group'."

22. In the Australian case of Applicant A (1997) 142 ALR 331, the appellants, a husband and wife, had come to Australia from China. They had one child. They lodged applications for recognition as refugees on the basis they feared sterilisation under the 'one child policy' in China if they returned. The question before the High Court of Australia was whether the appellants formed part of a "particular social group". The High Court held it was impermissible to define a particular social group by reference to an act that gave rise to the well founded fear of persecution.

23. Dawson J. at p.340 stated:

> "A 'group; is a collection of persons. As Lockhart J. pointed out in Morato v. Minister for Immigration, the word 'social' is of wide import and may be defined to mean 'pertaining, relating, or due to ... society as a natural or ordinary condition of

> human life'. 'Social' may also be defined as 'capable of being associated or united to others' or 'associated, allied, combined'. The adjoining of 'social' to 'group' suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society."

Dawson J. at p.341 stated:

> "There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. . .

Moreover, if a shared fear of persecution were sufficient to constitute a particular social group, it would render at least three of the other four Convention reasons - race, religion and nationality - superfluous. It is one thing to say that the five Convention reasons can overlap; it is quite another to construe one of them in a manner which renders three of the others unnecessary and the fourth - political opinion - almost so. To construe the term 'particular social group' in that way would make it an almost all-encompassing safety net, allowing a persecutory law or practice of general application to constitute those whose actions bring themselves within its terms members of a particular social group. Such a construction would be contrary to the context in which the words 'particular social group' appear."

24. McHugh J. expressed an important qualification to this rule at p. 359:-

> "Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."

McHugh J. stated:-

> "The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerrillas, for example, are not a particular social group.

A group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient that the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. In Roman times, for example, Christians were a particular social as well as religious group although they were forced to practise their religion in the catacombs. If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status. Nor is it necessary that the group should possess the attributes that they are perceived to have. Witches were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft."

25. In the Australian case of *V.T.A.O. v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 927 (19th July 2004), Merkel J. held at para 34:-

> "In my view the RRT fell into the same kind of error in relation to the reasoning in Applicant A as the Full Court of the Federal Court fell into in Chen. In the RRT's reasoning in respect of the applicant parents it treated the parents' reliance on their fear of the penalties they are likely to suffer under laws of general application as precluding them, on the basis of Applicant A, from being members of a particular social group. As a result of that conclusion the RRT did not consider the correct issue, as articulated above, of whether the harm and disabilities parents of 'black children' suffer have, as a result of the legal and social norms prevalent in Chinese society, over time resulted in such persons becoming a particular social group."

26. *Liu v Secretary of State for the Home Department* [2005]EWCA Civ 249 [2005] 1 W.L.R. 2858 is the only English Court of Appeal decision on the Chinese one child policy and membership of a particular social group. The court accepted that the general principle that a "particular social group" within the meaning of Article 1A(2) of the Convention should exist independently of the feared persecution had an important role to play. Nevertheless, that principle was qualified in that the actions of the persecutors might serve to identify, or even cause the creation of, a particular social group in society.

27. The applicant in Liu was a citizen of China. She came from an isolated rural area where she lived with her husband and two children. China's reproduction control laws restricted couples to the right to have one child, eligible couples being entitled to apply for permission to have a second. In October 2000, the applicant, when eight months pregnant with her third child, was forcibly taken to hospital and the foetus removed by Caesarean section. Subsequently, the applicant refused to undergo sterilisation, escaped from officials and left China, arriving in the United Kingdom in June 2002. An adjudicator allowed the applicant's appeal against the rejection by the Secretary of State of her asylum claim, holding that she had a well-founded fear of persecution for reasons of her "membership of a particular social group" should she be returned to China, within the meaning of Article 1A(2) of the Convention and Protocol relating to the Status of Refugees. The Secretary of State's appeal was allowed by the Immigration Appeal Tribunal on the ground that the applicant was not at risk of persecution as a member of a particular social group, since the group contended for by the applicant, namely, rural women accused of transgressing the population control policy by choosing to have a third child, did not exist

independently of the feared persecution.

28. In *Fornah v Home Secretary* [2007] 1 A.C. 412, the appellants appealed against decisions that they were not refugees within the meaning of the Convention Relating to the Status of Refugees 1951 (United Nations) Art.1A(2) . The House of Lords held that the Guidelines on International Protection, which had been issued by the UNHCR with a view to clarifying which persons were members of a particular social group, provided a very accurate and helpful distillation of the effect of the relevant international authorities.

29. Baroness Hale, at p. 97, stated:-

> "Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. . .
>
> Asylum can only be claimed by people who have a well-founded fear of persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'."

Baroness Hale also referred to the 2002 UNHCR 'Guidelines on Membership of a Particular Social Group' at para 98:-

> "While the ground needs delimiting - that is, it cannot be interpreted to render the other four Convention grounds superfluous - a proper interpretation must be consistent with the object and purpose of the Convention. Consistent with the language of the Convention, this ground cannot be interpreted as a "catch all" that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention's definition of a refugee, a social group cannot be defined exclusively by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group)."

30. Lord Browne stated at p.468:-

> "Thirdly, I would stress the narrowness of the 'circularity' argument: the argument that there must necessarily be excluded from Convention protection the persecution of any group defined solely by the fact that its members face persecutory treatment. As para 11 of the UNHCR Guidelines puts it, the people in a qualifying group must share a common characteristic 'other than their risk of being persecuted'. Secretary of State for the Home Department v Savchenkov [1996] Imm AR 28 is a good illustration of the circularity argument in operation: the Court of Appeal there refused to accept as a particular social group those persecuted by the mafia for having refused to join or cooperate with it. Another instance of where the argument would apply is to be found in McHugh J's judgment in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 , 265: 'those indiscriminately killed or robbed by guerrillas'. By contrast, however, as McHugh J had just explained, left-handed men, once on that account persecuted and publicly perceived to have been persecuted for their left-handedness, are properly to be regarded as members of a particular social group. Being left-handed is itself clearly a common characteristic, in a way that being a victim of the mafia or of guerrillas is not. Auld LJ was, I must conclude, wrong to reject McHugh J's left-handed group illustration. All persecution is by definition unjust and almost all of it is irrational. Assume that albinos were openly persecuted simply because of their appearance. Could it really be said that they were outside the protection of the Convention? Plainly not. I repeat, the circularity argument is a narrow one."

Discussion

31. The story told by the applicants in this case is harrowing if it is true. This was the account that the Refugee Appeals Commissioner and the Tribunal had to consider in determining whether this couple were entitled to refugee status. The applications had to be considered on paper only by the Tribunal, so there was no opportunity for the applicants to attend in person to explain discrepancies in their accounts, either internally as between what the husband or the wife had said previously compared with the later version or in contrasting information as between husband and wife in their different interviews or applications. This was in accordance with s. 13(6) of the Refugee Act 1996, as inserted by the Immigration Act 2003. In these circumstances, it seems to me that the assessors of the credibility of the applicants laboured under considerable difficulty in making their evaluations and conclusions. For their part, the couple themselves have encountered the problem that there may be matters apparently adverse to their claims or inconsistencies for which they might be able to account satisfactorily if they had the opportunity of presenting their cases at oral interview and questioning.

32. The trial judge was apparently very impressed by the applicants' story which is entirely understandable, but it is unnecessary for this Court to come to any conclusion on the substantive question. We are confined to considering whether the High Court was correct in its analysis of the judicial review application as to whether the couple were the subject of satisfactory procedural processes in accordance with the relevant legislation and with established constitutional principles of fair procedure.

33. The applicants criticised and challenged the process of evaluation of their asylum claims on fair procedure grounds which I will address. But the more fundamental issue in the case that overhangs and dominates the other questions is whether, assuming all the facts alleged by the applicants to be found in their favour, those facts constitute grounds for asylum. The parties in this appeal recognised this as the essential and fundamental issue, although there was no concession made on the procedural questions.

34. Another point should be mentioned in order to dispose of it. The trial judge held in favour of the applicants on the fundamental issue of entitlement to refugee status, assuming that their stories were accepted as being credible, on the basis that their case was arguable, but in applying a test of arguabilty, the judge was in error and his finding in that respect cannot stand. It may be that the court simply misspoke on the occasion and actually applied a more substantial criterion to the question, notwithstanding the words actually used. However one looks at the matter, it is clear that this Court could not simply declare the standard that the judge applied to be erroneous and to allow the appeal on that ground. We have to consider the matter as one of substance. I think that the way to address the issues in the appeal is to consider the fundamental question that it is agreed on both sides has to be resolved.

Particular Social Group

35. The question is whether the applicants, as persons who have breached China's one child policy, may be considered members of a particular social group who face persecution for that reason. It is not enough that people face persecution; in order to qualify for

asylum they must do so for a Convention reason. In this case, the relevant category is membership of a social group. The fact of persecution is not capable of defining the group – the fact that a number of people are at risk of persecution does not of itself entitle them to be considered as members of a social group.

36. It is noteworthy that the Irish Statutory Instrument incorporating the Directive into Irish law operates so that an applicant may succeed if he or she establishes only one of them. The first is the innate characteristics or common background that cannot be changed and the second is that the group is perceived as such in the surrounding society.

37. There are credibility issues that arise in regard to every aspect of these applications, but for the purpose of this consideration, we assume that the essential core of their accounts is correct.

38. It seems to me that the question in this case is whether the applicants can be considered members of a group that have a common background that cannot be changed, or alternatively, that they are members of a group that has a distinct identity in China because it is perceived as being different by the surrounding society. This is the important alternative or disjunctive application by the Irish Statutory Instrument of the provisions in the Directive.

39. If this matter had to be decided without the benefit of the judgments that had been cited from other jurisdictions, it might well be thought that the concept of a social group involves features that are identifiable or recognisable to an observer, perhaps a person with knowledge of the particular country and circumstances. The asylum seeker would be expected to point to things about the group of which he or she was a member that attracted the hostility of the potential persecutor. If one looks at the other categories that attract refugee status, such a notion of the particular social group appears to be consistent as a matter of interpretation. It is easy to see, on that understanding, how the two elements of the definition of group are related. One feature is concerned with the group itself and its features that are in common, whereas the other focuses on how the surrounding society regards the group. That might appear to be a reasonably persuasive analysis.

40. That interpretation is, however, inconsistent with a number of the leading judgments in other common law countries. The principles derived from the cases may be summarised to begin with. The New Zealand ZWD case is clear logical rejection based on the difficulty of defining the group for the purpose of the Convention. The English cases are open to a very wide definition of a particular social group. The Canadian courts have countenanced a category as proposed here: allowing it in Chan; disagreeing with that in Cheung but ultimately deciding the case on a different ground. The Australian case of A did not recognise the particular social group but identified an important qualification to the principle that exposure to persecution cannot define the social group. Australian jurisprudence recognised that a child born contrary to the policy was deserving of recognition as a member of a particular social group.

41. If it is possible to have a group within the meaning of the protected species comprising all of the women of Pakistan, for example, it is wrong to require the definition of a group as being restricted or specific or identifiable in the way above described. The Australian cases do go some distance along the road with the submissions of the State appellants, but it seems to me that they stop considerably short of the destination required for the appeal to succeed on this ground. The acknowledgement that the persecution in question can itself define or contribute to the definition of the social group is a point in support of the asylum seekers. The Canadian cases are the primary foundation on which the refugee claim rests, but I do not think that there is an unbridgeable gulf between the two commonwealth countries, and certainly not as great a difference as might be supposed after comparing Cheung's case in Canada with A in Australia. The comments of McHugh J. as to how persecution can itself create a group from among people who have some characteristic in common may be cited in support. As for the English cases, they seem to me to lean very much in favour of the applicants' position.

42. In regard to the position in New Zealand reflected in the views of Mr. Haines Q.C., an acknowledged expert, which were heavily relied on by the Tribunal, they are of great interest also. That analysis is very much against the couple in this case, and if it were the only relevant authority on the meaning of particular social group in the Convention, it would weigh heavily in favour of the State appellants. It does seem to me, however, that the difficulty of locating the claims of these refugee applicants within a definition of a particular social group may not be so great an impediment to the asylum claim itself as may appear at first sight. I think that was Mr. Haines means is that because it is difficult to say precisely what the group is to which Chinese parents of multiple children belong, it follows that a definition of a qualifying group is elusive. In that regard, I appreciate the difficulty, but I think that when the general principle is accepted, the choice between different possible groups or definitions is less decisive or even not decisive at all.

43. In light of the various authorities, I think it is impossible to adhere to a strict and narrow definition of a particular social group. It is also important that we are not considering a provision intended to be restrictive, but rather the opposite. That does not mean that it is to be expanded beyond its proper meaning, but it does justify the court in choosing a broader and more generous interpretation as between meanings that are equally legitimate.

44. It seems to me that these relevant and persuasive authorities of the applicants, even those cases that appear to shut out the possibility are subject to important qualifications. The English authorities are particularly helpful to the applicants' case on this issue. As for the high point of the argument on behalf of the State appellants, the Australian case of A, the qualification inserted by McHugh J. represents a significant adjustment of what might be taken to be a clear expression of principle. That comment has been endorsed widely in subsequent judgments.

45. In my view, the applicants cannot be excluded from consideration ex ante of membership of a particular social group because of impossibility of compliance with the definition. In regard to the perception of the group by surrounding society, I think that is also a matter for evaluation of the relevant evidence and it is not susceptible of an exclusionary a priori judgment.

46. It is emphasised in the cases that punishment itself does not define the particular social group. It may influence the establishment and even the definition, as observed by McHugh J. in his important qualification in the Australian case of A. The State appellants lay considerable emphasis on the fact that the basic precept exists as to punishment or persecution being incapable of defining the group, but when it is added to a circumstance where there is a general prohibition, their case is strengthened. The law in question that is allegedly persecutory if it is of general application is thereby incapable of carving out or focusing on or selecting a particular group that is then capable of being considered as a particular social group within the meaning of the Convention and its implementing measures. However, it seems to me that there may well be a case of a persecutory law of general application as enacted, but the circumstances of its enforcement may be different in one place as compared with another. That is the case that the applicants made in regard to their own experiences. It seems to me, as a matter of logic and legal reasoning, that the question of enforcement is sufficient in itself to undermine the validity of the point as to general application. That could only arise, as I see it, in circumstances where there was also uniform enforcement throughout the relevant jurisdiction.

47. I should also say that I am not convinced of the validity of the point about general application. If one takes a severe law that amounts to persecution and considers its application and its enforcement, it does not necessarily follow that those who are exposed to punishment under this law are excluded from being a particular social group. If everybody is subject to persecution in the event that they breach an unjust law, can it be said that those who put themselves in the way of undergoing the persecution by breaching the law are incapable of bring considered as a particular social group? I would not hold that such persons would necessarily or probably comprise a particular social group, but my point is that one cannot, on an a priori basis, declare that those people are so incapable. Moreover, it would be possible for persons defined as those who breached an unjust law would be perceived by the rest of society as comprising a group for this purpose. It is clear that the law in question here is fundamental human rights such that resistance to it could not legitimately be considered as simply a case of people who break the law. It would rather be a putative class of persons forming a group of those who resisted interfered with the fundamental human rights of all those to whom it applied.

48. My view in essence is that the law is of general application but it is in fundamental breach of the human rights of all affected persons. Persecution is a given when the law provides sanctions of forcible male and female sterilisation, inter alia. A particular social group may be defined as comprising persons who breach an unjust law and are exposed to such punishment or to social pariah status by the surrounding society. There are therefore crucial factual issues as to whether the law is enforced and how; these applicants' case as presented and if true is evidence of implementation in their province at the time of their departure.

49. In regard to this issue, I would therefore dismiss the appeal by the State appellants, remitting the matter to the Tribunal for fresh consideration.

Credibility

50. It seems to me that on this issue also, the applicants made out a sufficient case in the High Court to justify the order of the trial judge to overturn the Tribunal decision and return the cases for reconsideration. I think that the applications were made more difficult for the Tribunal by circumstances that were in no way the fault of the Tribunal and that were indeed brought about by the applicants themselves. There was in fact no face-to-face encounter at the Tribunal at which they could have addressed the credibility issues that proved crucial to the determinations. That was a result of the application of s. 13(6) and can be laid at the door of the applicants themselves. I do think, however, that the circumstances of the consideration of the cases warranted particular care on the part of the Tribunal in arriving at credibility findings.

51. There was relevant documentary material that tended to support the story told by the applicants which required careful consideration. It does not follow, as I am eager to point out, that the conclusion in respect of the material had to be favourable, but it was important that it should be put in the balance in the analysis of the cases. I am uneasy about the legitimacy in considering credibility of comparing and contrasting the interviews of two people who provided the information to different questioners and who did not have the opportunity of reconciling their accounts insofar as they were thought to be inconsistent. I would not condemn that approach as a general proposition, particularly in cases where the applicants were confronted with apparent conflicts. There is often a dearth of information available to an assessor which he or she can use to assess credibility. So if there is in effect a joint application, it may be entirely legitimate to look at them together. But care is still required to ensure that one person’s application is not rejected because of another’s failure. The problem with this case arose because of the exclusively paper consideration of the cases.

52. It is unnecessary to refer in detail to the issues of fact that were cited by the applicants in their submissions, but they did include documents in respect of the fines and confirming the gynaecological procedure that the wife underwent. It was also said that the wife’s experience of ligation tended to undermine the country of origin information.

53. Did the Tribunal consider the two cases fully, properly and in accordance with fair procedures? Overall, I think that the applicants have made and made in the High Court a sufficient case that their applications did not receive the detailed careful consideration that they deserved. I do not say for a moment that the story advanced by the applicants had to be accepted, but merely that it was not simply a bald story that was wholly unconfirmed or uncorroborated and that the material they produced and their explanations required a more elaborate review and an explanation as to how and why it was to be rejected. In this respect, therefore, I would uphold the finding of the High Court.

Country of Origin Information

54. I do not think it is appropriate for a court in a judicial review application to search through the materials for some piece of information that might be considered to have had an impact on the decision, but which it can be demonstrated the Tribunal did not expressly refer to in its determination. The applicants and their advisers are entitled to put information before the assessor and they did so in this case. For my part, I think that an applicant has a high threshold in making the case that the Tribunal did not consider all the relevant material simply because it is not addressed in the written determination. I would therefore reject the complaint made by the applicants in this respect.

55. Following the hearing of the case, the State appellants made further information available to the court, which had just recently come to light, about changes in the one child policy in China. That was proper in an asylum case. The information is not, however, material to the decisions that must be made on this appeal, but it will be relevant to the fresh consideration of the cases that should now take place.

Conclusion

56. In my view, the High Court judge mis-stated the test to be applied in referring to arguability. He was, however, correct in granting judicial review and directing reconsideration of these applications by the Tribunal on the grounds advanced by the applicants in respect of the consideration of their membership of a particular social group and in respect of the adverse credibility findings made by the Tribunal.

57. I would accordingly dismiss the appeal.